

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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ARMSTRONG, et al., : 07-CV-3561  
Plaintiff, :  
v. : May 14, 2008  
METROPOLITAN TRANSPORTATION : 500 Pearl Street  
AUTHORITY, et al., : New York, New York  
Defendants. :  
-----X

TRANSCRIPT OF CIVIL CAUSE FOR GENERAL  
PRETRIAL SUPERVISION AND DISCOVERY DISPUTES  
BEFORE THE HONORABLE HENRY B. PITMAN  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs: DEANNA WALDRON, ESQ.  
RACHEL NICOTRA, ESQ.

For the Defendant: CRAIG BENSON, ESQ.  
STEPHEN FUCHS, ESQ.

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1 THE CLERK: Armstrong v. MTA.

2 Counsel, please state your name for the record.

3 MS. WALDRON: Deanna Waldron of McLaughlin and Stern  
4 for plaintiffs. I'm here with Rachel Nicotra and my co-counsel  
5 Mr. 1.

6 MR. SIEGEL: Norman 1, 260 Madison Avenue.

7 MR. BENSON: My name is Craig Benson along with  
8 Stephen Fuchs from the law firm of Littler Mendelson P.C.  
9 Along with us is Rhonda Mull who is in-house counsel for the  
10 MTA.

11 THE COURT: Good afternoon all. Judge Lynch has  
12 referred the matter to me to resolve discovery disputes.  
13 Actually for the purpose of general pretrial supervision,  
14 excuse me, which includes resolving discovery disputes and  
15 scheduling issues. He's also sent me the party's joint letter  
16 of May 5, 2008 which is the -- which outlines the disputes that  
17 brings us here.

18 With respect to the scheduling issue, I'm going to  
19 grant -- both sides I take it want the additional ninety days.

20 MS. WALDRON: Yes, Your Honor.

21 THE COURT: The discovery is extended by ninety days.  
22 You should contact Judge Lynch's staff about the June 13  
23 conference to see what he wants to do with that. I can't  
24 control Judge Lynch's calendar so you should contact his staff.

25 The next issue -- the substantive discovery issue,

1 the real discovery issues are the production of personnel files  
2 and the extent to which they should be produced. They seem to  
3 fall into two categories I think in terms of comparators and  
4 non-comparators. Why don't we talk about -- one thing which  
5 might be helpful to start and maybe we can get this from  
6 counsel for defendant.

7 Can counsel for defendant tell me generally the  
8 classes of information that are in personnel files for the MTA  
9 police? Is there some kind of matrix of what goes into a  
10 personnel file?

11 MR. BENSON: There's no matrix, Your Honor. There are  
12 files that come from several different areas in the MTA that go  
13 into a police officer's file. There's an Internal Affairs file  
14 which would include the applicant investigation when the police  
15 officer was first interviewed, the extensive background check  
16 that goes in. There's disciplinary files. There could be a  
17 file if the person was employed by the Long Island Railroad  
18 prior to the MTA PD being created. There would be a file with  
19 that or the Metro North Railroad. There would be a training  
20 file. There could be a benefits file. There are several  
21 different components that come from different areas of the MTA  
22 structure, all of which are generated with response to the  
23 documents that were responsive to the original discovery  
24 request for a police officer. So there's a lot of different  
25 pieces of file encompassing the discovery request could be

1 quite large depending on how long the police officer had been  
2 employed or how extensive the background for that police  
3 officer was.

4 THE COURT: Let me turn to the -- let's address the  
5 comparators first because maybe that's the easier issue. With  
6 respect to the comparators, maybe plaintiffs can start by  
7 telling me exactly what do you want with respect to the  
8 comparators and why. It seems to me the whole file might well  
9 be overbroad but I'm happy to hear what you have to say.

10 MS. WALDRON: Well, Your Honor, we may be able to not  
11 need the medical or benefits file portion of it but the  
12 portions that we do are very interested in are the  
13 disciplinary, the training files and any other -- we don't  
14 really know exactly what's in the files either but any relevant  
15 part of the file that shows commendations that they're awarded,  
16 applications that they've gone for any positions because the  
17 reason why that we need these files is because we claim that  
18 these people are similarly situated to some of our claims. It's  
19 not all ten but some who are applying for positions, promotions  
20 to detective, for trainings, for positions in special units and  
21 that these are some of the comparators. We've limited, Your  
22 Honor, quite a lot to what we think that we -- there may be  
23 additional comparators that we would like but we're limiting it  
24 to these people who were promoted to detective in the past four  
25 years and also persons who received transfer into one of the

1 special units called the Inter Counter Terrorism Task Force. I  
2 hope I got that right. ICTF is what everyone calls it in our  
3 case. So that's the why.

4 We have plaintiffs who applied for and were not  
5 promoted to detective in that same time period and who also  
6 applied --

7 THE COURT: I should have said this before. If you'd  
8 like to remain seated if you're more comfortable. Whatever  
9 your pleasure is. It goes for everybody. Go ahead. I'm sorry  
10 for interrupting. Go ahead.

11 You were talking about the ICTF --

12 MS. WALDRON: Transfer -- we claim that these, the  
13 people whose files, the comparators that we're looking for is  
14 the files are people who were promoted to detective were  
15 transferred into special units or received training within the  
16 past few years that certain of our plaintiffs also were  
17 claiming for. That's why we seek for these comparators.

18 Then in addition, comparators actually fall into two  
19 different categories. Your Honor, the other category of  
20 comparators are people who -- members of the police department  
21 who were given or not given discipline based on incidents that  
22 we believe were either more egregious than incidents that our  
23 plaintiffs were subject to -- were disciplined for or -- yes,  
24 that's about it.

25 THE COURT: Well, presumably if there was a charge

1 that would be in the disciplinary files whether or not it  
2 resulted in sanctions.

3 MS. WALDRON: We don't know, Your Honor. We have only  
4 seen our plaintiff's files. So we don't know what's in the  
5 other files.

6 THE COURT: If someone did something inappropriate  
7 that they were never written or possibly inappropriate that  
8 they were never written up for, it would seem that there would  
9 not be any paper record.

10 MS. WALDRON: Well, Your Honor, some of them  
11 there's -- that's the other reason why we were asking for  
12 particularly sometimes greater than just the disciplinary file  
13 because sometimes they put things -- they're almost unofficial  
14 memos about things that people have done but that they don't  
15 rise to the level of a disciplinary charge and those are --  
16 we've seen that happen in at least -- in some of own  
17 plaintiff's case. The five disciplinary comparators that we're  
18 seeking disciplinary files for though were -- there are charges  
19 filed and if the question is that the way that that  
20 disciplinary was handled and also the level of discipline that  
21 was given for incidents that we believe are much more egregious  
22 than things that our plaintiffs were involved in and some of  
23 our plaintiffs have been subject to discipline that we think  
24 was unwarranted. So there's definitely an issue in this case  
25 about discipline and who gets it and how and what kind of

1 discipline.

2 THE COURT: So with respect to comparators what I  
3 understand you'd be looking for are the disciplinary file or  
4 other documents reflecting some type of misconduct. The  
5 training file, I guess their initial application which would  
6 have their credentials and the applications for promotion.

7 MS. WALDRON: And applications for transfers and  
8 trainings. That would include supervisor recommendations.  
9 Again, we don't know exactly what it looks like but that's what  
10 we believe that it looks like.

11 THE COURT: All right. Who wants to address the issue  
12 from defendant's side?

13 MR. BENSON: I will, Your Honor. From our standpoint  
14 the whole case revolves around the concept of similarly  
15 situated in comparators because I think we're all in agreement  
16 that in order for us to have to produce these things they have  
17 to be legitimate comparators.

18 THE COURT: The ultimate -- I read that in the letter  
19 but the ultimate issue of whether someone is an appropriate  
20 comparator or not is ordinarily a question of fact for the  
21 jury. Look, I'm not trying to foreclose the issue but if you  
22 want to resist discovery on the grounds that these individuals  
23 are not appropriate comparators don't I need a factual  
24 submission establishing that the punitive comparators are so  
25 differently situated that no reasonable jury could find that

1 they're comparators.

2 MR. BENSON: I don't disagree with Your Honor's  
3 assessment of that and we have never taken the position that  
4 they're not entitled to legitimate evidence when it comes to  
5 comparators, but what we're talking about here, for example,  
6 is -- Ms. Waldron said that these are individuals who were  
7 promoted to detective and some of the plaintiffs weren't.  
8 Well, these individuals were promoted to detective at a time  
9 when not a single one of the plaintiffs applied to be a  
10 detective.

11 So, yes, if the plaintiffs had gone for a position  
12 and these individuals had gone for the same position and were  
13 appointed and the plaintiffs weren't, we have no problem giving  
14 the applications over and they have a legitimate right to  
15 compare them. But we're talking here about apples and oranges.  
16 Simply because somebody at one point in time applied to be a  
17 detective and was appointed a detective does not mean that that  
18 opens up their personnel file for all kinds for anybody in the  
19 future who might ultimately apply for detective down the road  
20 and not get appointed. Different times, different decision  
21 makers, different everything. I mean they are not even close  
22 in terms of similarly situated from a comparison standpoint.

23 Again, in terms of training, anything. We've made it  
24 clear to the plaintiffs that to the extent that they can  
25 identify any single individual who was allegedly provided with

1 an opportunity that any one of the plaintiffs was denied, we  
2 are more than willing to give them relevant documentation with  
3 respect to that individual. They have failed to come forward  
4 with any such contention.

5 THE COURT: Well, the law with respect to discovery  
6 though is that the party resisting discovery ordinarily bears  
7 the burden of establishing that the discovery sought is  
8 inappropriate. Look, it's theoretically possible that the  
9 individuals that the plaintiffs have designated as comparators  
10 are so dissimilarly situated than plaintiffs are that perhaps  
11 as a matter of law they could not be considered comparators.  
12 That may well be the case but -- I don't know if it is or  
13 isn't, but before I can reach that conclusion isn't it  
14 incumbent upon the defendants as the party resisting discovery  
15 to make a factual showing that the individuals who are  
16 designated as comparators by plaintiffs are so differently  
17 situated that they're not appropriate comparators as a matter  
18 of law which doesn't -- and in turn doesn't that then require a  
19 showing that comparator number one is different from plaintiff  
20 1 through 10 because fill in the blank? Comparator 2 is  
21 different from plaintiffs 1 through 10 because fill in the  
22 blank.

23 MR. BENSON: Well, as I've stated, Your Honor, all --  
24 THE COURT: Go ahead.

25 MR. BENSON: If I may. I don't mean to interrupt

1 you.

2 THE COURT: I'm sorry, go ahead.

3 MR. BENSON All comparators to the extent that these  
4 were individuals who were "promoted to detective" were promoted  
5 to detective at a time when not a single one of the plaintiffs  
6 applied to be a detective and I would think that that would  
7 satisfy exactly the standard that Your Honor just articulated.  
8 I mean similarly situated does have meaning and it -- if  
9 they're going to establish that they were discriminated against  
10 they need to show that they were treated differently from  
11 similarly situated individuals. Individuals who were promoted  
12 several years before or at a time when none of them applied are  
13 not similarly situated, and this brings me to the second point  
14 which sort of is important for us to address as we look at this  
15 entire dispute and that is that this is not a pattern and  
16 practice case. It cannot be a pattern and practice case  
17 because it is not a class action. It is essentially ten  
18 separate individual disparate treatment lawsuits and in a  
19 disparate treatment lawsuit the burden is on the plaintiff  
20 ultimately to show that they were discriminated against vis-a-  
21 vis similarly situated individuals.

22 So the fact that there may have been at another point  
23 in time while one could potentially argue that --

24 THE COURT: Well, one of the ways you show intent  
25 though or one of the ways you can show intent is through

1 similar act evidence. Morgan -- was it Morgan v. Amtrak  
2 expressly notes that and 404 of the Federal Rules of Evidence -  
3 - I don't know if it's 404 or 403 says that one of the ways you  
4 can -- [inaudible] mimic is the way I learned it in law school,  
5 motive, intent, absence of mistake, identity, common plan or  
6 scheme where the issue -- the issues on which you can show --  
7 are the issues on which you can show similar act evidence.

8 So intent is ordinarily something -- an issue on  
9 which similar act evidence is admissible.

10 MR. BENSON: That may be true. However, when you're  
11 talking about discrete acts. For example, when you're talking  
12 about promotions, when you're talking about training, things  
13 like that that happened in a discrete point in time the case  
14 law is very clear that you cannot go back and pull in that sort  
15 of general comparative evidence. The Supreme Court was very  
16 clear on that.

17 THE COURT: No, the issue -- if X is the plaintiff or  
18 the -- let's assume the plaintiff is an X and make X any  
19 protective characteristic you want to be and if the plaintiff  
20 is saying I was not promoted because I'm X and if you can show  
21 that the decision maker at another point in time said we have  
22 too many X's around the shop, we don't need any more of these  
23 X's well, that would be admissible.

24 MR. BENSON: Depending on -- depending on temporal  
25 proximities.

1 THE COURT: Exactly. If it's twenty years before the  
2 decision maybe not but let's assume it's within two years of  
3 the decision it would be admissible --

4 MR. BENSON: But that's a discrete smoking gun sort  
5 of -- that goes into the whole stray remark different type of  
6 evidentiary issue, but my point is simply that is that the case  
7 law is clear that when you are dealing with discrete acts that  
8 happened at a point in time that you can't go into that sort of  
9 continuing violation type evidence that Your Honor is speaking  
10 about and --

11 THE COURT: Well, but we may be getting off -- it's a  
12 fascinating discussion but we may be getting a little far  
13 afield of the comparator discovery issue.

14 MS. WALDRON: As far as I know factually, Your Honor,  
15 we have allegations from our plaintiffs that they did apply at  
16 the same time as some of these individuals and they also  
17 applied in the year before and the year after and there's a  
18 question of fact here about these abstracts or applications or  
19 postings that they call it at the MTA, abstracts, call for  
20 abstracts that we believe that it's not clear who applied when  
21 so that we picked the people who were promoted in 2004 which is  
22 not even calling into -- anything about the statute of  
23 limitations issue that as we all say philosophically has raised  
24 at this point, but these are people in the past -- statute of  
25 limitations period and these are people -- plaintiffs --

1 factually we agree. There would have to be a hearing on  
2 whether these people are similarly -- we believe they are  
3 similarly situated because plaintiffs have applied within the  
4 year -- that year and the year before and the year after for  
5 the similar positions and it's not just having to do with,  
6 again -- Your Honor is right. Having to do with the motive and  
7 intent and all of that. Also, for discrimination claims we  
8 believe it's completely relevant for --

9 THE COURT: It seems to me unless the defendant can  
10 make a factual showing -- I'm happy to give the defendant the  
11 opportunity, to chance to do that and I'll give plaintiff a  
12 chance to respond but unless the defendant makes a factual  
13 showing that the punitive comparators are so differently  
14 situated that as a matter of law they could not reasonably be  
15 held or could not reasonably be found to be comparators the  
16 plaintiffs are entitled to discovery of the personnel files to  
17 the extent of disciplinary files or documents reflecting the  
18 charges of misconduct, training files, the initial application,  
19 applications for promotion, applications for training.

20 If you want to make -- if you want to endeavor to  
21 make a factual showing that these people are so different that  
22 they couldn't be comparators as a matter of law I'm happy to  
23 give you the chance to do that, Mr. Benson.

24 MR. BENSON: Yes.

25 THE COURT: If you want to do that we'll set a

1 schedule.

2 MR. BENSON: Why don't we set a schedule and we will  
3 endeavor to resolve this separate and apart from that schedule  
4 and hopefully not use it.

5 THE COURT: All right.

6 MR. BENSON: How's that?

7 THE COURT: All right. If you want to make the  
8 factual showing can you -- what I'm thinking about is your  
9 submission a week from today and plaintiff's submission the  
10 29th, a week from tomorrow. I'm inclined to give them one more  
11 day because of the Memorial Day weekend. Or do you want some  
12 other schedule? What do you think?

13 MR. BENSON: Your Honor, if we could have a little  
14 more time than one week.

15 THE COURT: How much time do you want?

16 MR. BENSON: The following Monday would be --

17 THE COURT: It would be the following Tuesday, the  
18 27th.

19 MR. BENSON: The following Tuesday the 27th.

20 MS. WALDRON: Your Honor, we would request the same  
21 amount of time.

22 THE COURT: All right. So that's going to be  
23 plaintiff's submission on the 27th --

24 MS. WALDRON: Defendant's.

25 THE COURT: I'm sorry, defendant's submission. I'm

1 sorry. The 27th. So that's thirteen days from today. So  
2 thirteen days from the 27th is going to be May -- June 9th I  
3 guess.

4 MS. WALDRON: Your Honor, I'm sorry to ask again. Ms.  
5 Nicotra and I both have -- we're actually going to be out of  
6 the office the 4th, 5th and 6th. So if we could have just a  
7 few more days. Just not on the 9th.

8 THE COURT: What do you want?

9 MS. WALDRON: The 11th.

10 THE COURT: Any objection to that?

11 MR. BENSON: No objection.

12 THE COURT: So the response on the 11th. If you can  
13 work it out just all --

14 MR. BENSON: Just so I understand Your Honor that if  
15 we were going to produce it would be limited to the discipline  
16 file, it would be limited to the training file, it would be  
17 limited to the application for detective, and I think you also  
18 said the initial application and that's the part that's a  
19 little troubling to me is the initial application to become a  
20 PD.

21 THE COURT: I presume if somebody -- it's relevant I  
22 suppose because if someone has a Ph.D. in criminology from  
23 Harvard, if Harvard gives such degrees, and someone else has an  
24 associate's degree from a lesser institution I presume that's  
25 relevant to why one person got promoted and one person didn't.

1 That's why I thought the initial qualifications might be  
2 relevant. If someone comes to the MTA police force having  
3 spent ten years on the New York City police force and you've  
4 got somebody else who comes to the MTA police force fresh out  
5 of high school or fresh out of college I would think that would  
6 be relevant.

7 MR. BENSON: That's a fair point. Again, just so we  
8 don't split hairs here. We're talking about the application,  
9 not like the Internal Affairs investigation that goes along  
10 with it.

11 THE COURT: No, not the Internal Affairs.

12 MR. BENSON: The initial application.

13 THE COURT: The things that show their qualifications.

14 MR. BENSON: That's fine.

15 THE COURT: What you'd put on a resume or CV, that  
16 type of information.

17 The other thing is one thing you didn't list, Mr.  
18 Benson, which I had listed and this was in response to Ms.  
19 Waldron's comments, if there are any other documents in the  
20 file even if they're outside the disciplinary file that  
21 reflects some kind of misconduct. She was concerned about  
22 people who were -- may have engaged in misconduct and weren't  
23 prosecuted for for want of a better word. So if there were  
24 other documents in the file reflecting on the job misconduct  
25 whether they're in the disciplinary file or not --

1 MR. BENSON: I would -- they would have to be but  
2 I'll -- we'll endeavor to look if in fact they're not.

3 MS. WALDRON: The other thing, Your Honor, that wasn't  
4 mentioned but I'm assuming it will be -- we may not have a  
5 problem about this, but application for transfer to the special  
6 units and also commendations because the commendations would  
7 also be something that would go into whether someone is getting  
8 a position or not.

9 MR. FUCHS: Just a point of clarification on the way  
10 these documents work, Your Honor.

11 THE COURT: Hold on one second before you get to that  
12 point of clarification.

13 Is there any objection to applications for transfer  
14 and commendations?

15 MR. BENSON: Other than the big picture objection, no.

16 THE COURT: Mr. Fuchs, what did you want to say?

17 MR. FUCHS: As I was stating, one of the articles  
18 that's at issue here is something called an abstract. That's  
19 something that an officer submits in response to a notice that  
20 there's an opportunity to apply for a certain unit or for  
21 detective. Those documents may not necessarily be within the  
22 personnel files that have been requested and have been produced  
23 separately. So --

24 MR. BENSON: They've already been produced.

25 MR. FUCHS: They have already been produced.

1 MS. WALDRON: We have them already. We don't want  
2 them again.

3 THE COURT: The next -- the other half of the issue  
4 here -- I guess there's also a third piece with respect to the  
5 rosters. The supervisors and decision makers. Let me hear  
6 from plaintiff's side first on exactly what they're looking for  
7 and why.

8 MS. WALDRON: Well, Your Honor, we believe that the  
9 supervisors here -- it's a twofold argument. One, that they  
10 have themselves are similarly situated to our plaintiffs in the  
11 sense that they have committed their own serious infractions  
12 that -- and other issues, disciplinary penalties that they have  
13 had some incidents but that they haven't been disciplined as  
14 harshly as our plaintiffs have been. So there's that.

15 Then these are also -- most of these individuals that  
16 we requested or all of them are what we call the decision  
17 makers in the case -- at least one or more of our plaintiff's  
18 cases and that to show what's in their files is again relevant  
19 to as Your Honor said before the intent in a discrimination  
20 case. While they have -- the defendants have purported to give  
21 over -- turn over to us things such as civilian complaints and  
22 other complaints file with their internal OCR which is their  
23 EEOC office. We know that -- it's come up in at least one of  
24 our plaintiff's case where she claims that one of her  
25 supervisors claims that she wrote her reports in ebonics which

1 she thinks is a racially discriminatory remark. She makes the  
2 complaint about it but that did not show up in the production.  
3 So that it's just an example, Your Honor, of how things that  
4 they say -- without getting the full personnel file we don't  
5 know how they're categorizing things. Just because they're not  
6 putting it in the disciplinary file or they're not putting  
7 it -- calling it something that's supposed to be regarding  
8 discrimination that we didn't -- it wasn't produced to us.

9 So we believe that's why for the supervisors we  
10 believe that this is -- there's other supervisors who have been  
11 similarly --

12 THE COURT: If they're supervisors aren't they  
13 dissimilarly situated by definition?

14 MS. WALDRON: No, Your Honor, because while they  
15 were -- some of these events -- this is where again I guess  
16 we're starting to come into -- this is a hostile work  
17 environment continuing -- continued violation that's been going  
18 on. Some of these supervisors have done things over the years  
19 yet they're not disciplined in the same way. Under National  
20 Railroad, as you had recognized, this would be background  
21 evidence but it is potentially relevant to our case to show  
22 that the supervisors are treated -- not just supervisors but  
23 these specific --

24 THE COURT: Well, supervisors are always treated  
25 differently. That's nothing new.

1 MS. WALDRON: Some of this happened while they weren't  
2 supervisors is what we're trying to get at. So how they were  
3 treated while they were could be relevant background evidence  
4 and also the fact that these people did these things and yet  
5 they still get promoted to supervisor while our plaintiffs were  
6 having difficulty with this sort of -- and --

7 THE COURT: Then you're saying they're comparators.

8 MS. WALDRON: As I said, there's two -- some of these  
9 supervisors we do admit they're similarly situated and just  
10 with respect to the discipline. So with the disciplinary files  
11 we need somewhere where we could actually accept --  
12 disciplinary files or other documents that would reflect on  
13 discipline whether it's not specifically in the disciplinary  
14 file.

15 But, in addition, these supervisors, as I said,  
16 they're promoted despite having had allegations of  
17 discrimination against them and also, like I said, Your Honor,  
18 there's at least -- we have one incident, at least one that we  
19 can document where there is not any record that's been  
20 produced. It's regarding Sergeant Kim Riley who made -- who  
21 our plaintiff, named plaintiff or first plaintiff Marilyn  
22 Armstrong has complained that she made a remark about ebonics  
23 to her and that -- we received no discovery on that.

24 THE COURT: Do the supervisors for whom you're seeking  
25 files, did they all have seniority to the plaintiffs?

1 MS. WALDRON: At this point they do.

2 THE COURT: If you're not claiming that they're  
3 comparators I'm not sure that -- it seems to me that the  
4 request for all disciplinary charges is more of a stretch.

5 MS. WALDRON: Your Honor, I was saying that there's  
6 really a two pronged argument. They are similarly situated  
7 when it comes to discipline and --

8 THE COURT: Well, not when they're supervisors and the  
9 plaintiffs are not supervisors.

10 MS. WALDRON: But -- some of the incidents that we're  
11 claiming the discovery regarding -- occurred before they were  
12 supervisors.

13 THE COURT: Right. If that's a different point in  
14 time then the point in time at which the plaintiffs were  
15 disciplined for similar conduct the relevance becomes extremely  
16 attenuated. If you have, for example -- if you have someone  
17 who is a supervisor in 2005 who's disciplined in 1990 for  
18 having a sloppy uniform --

19 MS. WALDRON: They're a little more egregious than  
20 sloppy uniforms, Your Honor. It's like drunk driving and  
21 things of this sort and things that our plaintiffs did which  
22 were not.

23 Your Honor, I forgot. There was one other point  
24 here. There is a hostile work environment claim here that  
25 we -- our plaintiffs began working at the MTA back in the '80s.

1 THE COURT: But disparate discipline doesn't bear on  
2 hostile work environment.

3 MS. WALDRON: I believe it can, Your Honor, if it's of  
4 such a nature of that it's showing intimidation, insult,  
5 ridicule, that you're being brought up on charges that for our  
6 plaintiffs are quite minor or being written up for these memos  
7 that I was talking about before where they're not actually then  
8 later brought up on the charges but they're just intimidated by  
9 this. Yet there's people who then later have become  
10 supervisors have things like drunk driving or assault or  
11 improper arrests and they're then still promoted to supervisor  
12 we think it is relevant because we believe it's still  
13 continuing on into today.

14 THE COURT: So for the supervisors and the decision  
15 makers you're looking for documents reflecting charges of  
16 misconduct?

17 MS. WALDRON: Again, not just -- the disciplinary file  
18 but then also, Your Honor --

19 THE COURT: I'm using that language to get outside the  
20 disciplinary file.

21 MS. WALDRON: Yes. Right, yes. Memos, we would say  
22 any memos with regard to misconduct.

23 THE COURT: Yes. Documents reflecting charges of  
24 misconduct.

25 MR. BENSON: May I be heard, Your Honor?

1 THE COURT: Yes, please.

2 MR. BENSON: It's important for you to understand that  
3 when we're dealing with the term supervisor now that  
4 anything -- and that would include anybody from sergeant,  
5 lieutenant, captain, chief, these are --

6 THE COURT: I'm sorry to interrupt you. Maybe I'm  
7 misunderstanding. I thought there were specific individuals  
8 that they've named.

9 MR. BENSON: They have. But I just want you to  
10 understand these individuals that they've named hold these  
11 ranks.

12 THE COURT: Go ahead. I'm sorry.

13 MR. BENSON: The only way that one gets promoted to  
14 those ranks is by passing a civil service test and promotion is  
15 then based on one's rank on a civil service test. It does not  
16 involve subjective assessments on the part of individuals in  
17 the MTA. There's no allegation in this case that any of the  
18 plaintiffs have applied for and didn't become sergeants or  
19 lieutenants or anything of that nature. In other words, nobody  
20 is claiming that they took and passed a test and were somehow  
21 then discriminated against. So that's -- I give that as  
22 backdrop for you to understand how different these individuals  
23 are.

24 MS. WALDRON: Your Honor, I'm sorry to interrupt but  
25 there are at least two plaintiffs who make those allegations.

1 MR. BENSON: What allegations?

2 THE COURT: Let Mr. Benson finish. I'll give you a  
3 chance to respond.

4 MS. WALDRON: Sorry.

5 THE COURT: Go ahead.

6 MR. BENSON: So you are dealing with individuals who  
7 are truly in a dissimilar position than any of the plaintiffs.  
8 Judge Lynch directly addressed this issue in a conference  
9 before him because it was these individuals' personnel files  
10 where this subject was originally brought up and he held that  
11 any instances of -- any allegations of discrimination against  
12 these individuals is relevant and he went so far as to say any  
13 allegations of improper force because of the connection between  
14 improper force and race that might be relevant. So we produced  
15 those things as well. His ruling was very limited in that  
16 respect and in essentially holding and rightfully so that any  
17 other aspects of their files as it pertains to their role in  
18 this case as alleged discriminators was not relevant.

19 To claim now, to try to go around that ruling and get  
20 at this information by alternatively arguing that these  
21 individuals are comparators because, again, in terms of  
22 discriminators Judge Lynch has ruled is disingenuous and is not  
23 called for by any rule of evidence or anything else. I mean  
24 these individuals are not remotely similarly situated with the  
25 plaintiffs. Their promotion to sergeant or lieutenant or

1 whatever was again based on their passing a test that had  
2 nothing to do with someone's subjective assessment of whether  
3 they had engaged in discipline or not and I think does not  
4 justify us providing their statutorily protected personnel  
5 files.

6 THE COURT: Ms. Waldron.

7 MS. WALDRON: Well, first of all, I take issue with  
8 Mr. Benson's characteristic if I can put it that way of Judge  
9 Lynch's decision. We take the opposite view that Judge Lynch  
10 was merely saying that these were -- I think we've quoted his  
11 text. He said these were the personnel files of the bread and  
12 butter. I don't think there's a transcript from that. I wish  
13 there was, bread and butter of discrimination cases and that  
14 the contents were relevant and then he just simply had gone on  
15 to list which parts of that file he felt were particularly  
16 relevant. I didn't in any sense get the sense and neither does  
17 my co-counsel that the judge was limiting us to those.  
18 Otherwise we would not have been continuing to seek this, these  
19 kinds of files. That's my first point.

20 The second point is that there are allegations in  
21 this case. There's one of our plaintiffs who was a -- had  
22 achieved a level of captain and then was -- there's an issue  
23 about why he is not a captain any more and that he was --

24 THE COURT: He was demote -- one of the plaintiffs was  
25 demoted?

1 MS. WALDRON: They voluntarily -- this captain along  
2 with three other white captains voluntarily took a demotion  
3 because for collective bargaining reasons. While the others  
4 then were re-promoted he was not. So there's an issue in the  
5 case about that that is very relevant and impacts upon at least  
6 -- it's Inspector Terrett and Inspector Dunn where that is  
7 directly relevant because those are the two who were captains  
8 with Mr. -- Bryan Henry and now took the demotion and then got  
9 re-promoted whereas Henry did not.

10 Your Honor, this is a very complicated case in that  
11 there's ten plaintiffs. They're at various different points in  
12 their careers but everything we've asked for there's a reason.  
13 We're not just -- we're not on a fishing expedition. We have  
14 specific reasons for each one that if we parse through each one  
15 we will go through but we were attempting to --

16 THE COURT: The notion that they're comparators --  
17 unless one of the supervisors engaged in similar misconduct in  
18 connection -- in misconduct that was similar to the misconduct  
19 that one of the plaintiffs engaged in at or about the same time  
20 as the plaintiff and while the supervisor held the same rank as  
21 one of the plaintiffs --

22 MS. WALDRON: That would be Inspectors --

23 THE COURT: -- it seems to me that it's almost --  
24 it's awfully close, maybe it's there, they're not similarly  
25 situated as a matter of law.

1 MS. WALDRON: Well, Inspectors Dunn and Terrett are  
2 perfect examples how they were similar situated to Captain  
3 Henry -- to Lieutenant Henry when he was a captain and so that  
4 at the time we should be entitled to have those files of when  
5 he was -- they were -- at the same rank and there are issues  
6 about that. That's why I say, Your Honor, that if we have to  
7 take each one on a -- each individual on a point by point. As  
8 I said before, we're willing to accept less for the supervisors  
9 with regard to disciplinary and the other parts of that that --  
10 the discipline that's not specifically in the disciplinary file  
11 but that may impact upon it like misconduct.

12 Your Honor, we honestly -- we asked for these because  
13 we've been told this but we can't -- without the files we don't  
14 know what's in -- we don't know specifically. There's  
15 allegations of this and they're in our complaint but we don't  
16 know the specifics of it because we don't have the files.

17 THE COURT: Let me ask Mr. Benson. Mr. Benson, have  
18 you seen -- just answer this question yes or no. Have you seen  
19 the files of the individuals who are identified as supervisors  
20 or decision makers or has someone on defendant's side seen  
21 them?

22 MR. BENSON: I have, Your Honor.

23 THE COURT: Is the fight about real issues or is it a  
24 theoretical fight? Just yes or no. Unfortunately I had this  
25 come up with the NYPD with requests for disciplinary files and

1 often times -- I shouldn't say often times but sometimes what  
2 happens is I order that the file be produced and there's  
3 nothing in there anyway.

4 MR. BENSON: It's a real issue in the sense that if  
5 you order the production of a disciplinary file for someone in  
6 a supervisory position which going back to the commencement of  
7 their employment there could be things -- Ms. Waldron mentioned  
8 drunken driving. I don't know that any of the plaintiffs are  
9 complaining about how they were disciplined for drunken  
10 driving. We're talking about very different kinds of  
11 discipline and with all of the individuals that they've asked  
12 for if you go back to the commencement of their employment a  
13 review of anything that they were disciplined for is just not  
14 going to be comparable to what the plaintiffs are complaining  
15 about. If the plaintiffs were complaining that -- make a  
16 showing I was disciplined for X and we don't believe so and so  
17 was disciplined in the same way in a relevant time period but  
18 that's not what's happening here. They want to say that so and  
19 so, Inspector So and So was not disciplined for drunken driving  
20 and I got written up for talking back to someone or I got  
21 written up for an incomplete memo book entry and seeking to  
22 discover the entire disciplinary history is a way of showing  
23 this general pattern and practice of allegedly blacks and  
24 Hispanics receiving harsher discipline.

25 We think they need to make a showing. If it had been

1 articulated that Inspector Terrett and Inspector Dunne were re-  
2 promoted to captain and Inspector Henry was not, we're willing  
3 to piece that out and produce portions of files that relate to  
4 that. That makes them in our view -- that's a valid comparison  
5 but the issue is wholesale disclosure of all of these  
6 supervisor's entire disciplinary histories is an intrusion and  
7 we think we're duty bound to push back on this under the  
8 statutory protection.

9 THE COURT: There are things there -- there really is  
10 something there to fight over.

11 MR. BENSON: I would say it's a fair statement there's  
12 something to fight over in all of these files.

13 THE COURT: You've looked at the files?

14 MR. BENSON: Yes, Your Honor.

15 THE COURT: What offenses are the plaintiffs claiming  
16 they were unfairly disciplined for?

17 MS. WALDRON: Well, they're not as egregious as drunk  
18 driving.

19 THE COURT: Do we have a list of what the plaintiffs  
20 claim they were unfairly disciplined for?

21 MS. WALDRON: Well, it's a -- it spans a large -- from  
22 things like being late and not reporting -- not writing the  
23 reports to I think one of our -- assault.

24 [Pause in proceedings.]

25 MS. WALDRON: I think that's the range, Your Honor, of

1 where it goes from. So very, very minor to more significant.  
2 I don't have an exact list right in front of me given that  
3 there's ten people but I know it spans a wide array.

4 Then, Your Honor --

5 THE COURT: The problem that I'm having though is that  
6 it sounds like you've got different times, the decision about  
7 discipline is being made by different individuals. We don't  
8 know if the supervisors had the same rank as the plaintiffs at  
9 the time of the alleged misconduct. It seems like there are a  
10 lot of differences which attenuate the relevance of what you're  
11 seeking here.

12 MS. WALDRON: But the part that's all the same is that  
13 this is -- there does seem, even though we are all arguing over  
14 the use of this word pattern, there does seem to be some sort  
15 of a practice that goes on there where people who then like  
16 members have had things happen and that yet --

17 THE COURT: The fact that individuals who are of  
18 higher rank are treated differently than people of a lower rank  
19 though doesn't evidence anything.

20 MS. WALDRON: But they may not have been of a higher  
21 rank, Your Honor, at the time which is the allegations that  
22 are -- this is -- some of the allegations as I said -- Captain  
23 Henry is a perfect example. Captain Henry and Dunne and  
24 Terrett were all captains at the same time.

25 THE COURT: But then the problem is if the person

1 who's the supervisor today got a slap on the wrist for being  
2 five minutes late ten years ago and one of the plaintiffs is  
3 more seriously disciplined today for being late by a different  
4 decision maker --

5 MS. WALDRON: I don't --

6 THE COURT: The relevance is attenuated.

7 MS. WALDRON: Well, we don't believe that that's  
8 what -- we believe that there is more similarities to some of  
9 these supervisors to the plaintiffs at the time than -- then as  
10 I'm saying, these are what we are being told by our plaintiffs  
11 and we need records. We can't disprove it or prove it unless  
12 we have records to show that. We have some allegations. We  
13 have some examples but we're going based on what the plaintiffs  
14 who were there at the time are telling us. That's all we can  
15 go on. We know -- at least Henry was of the same rank as two  
16 of the people that we're looking for their files for, at least  
17 during a portion of the -- we're looking for here.

18 I believe that that aids the case with other of the  
19 supervisors on the list, that these supervisors weren't always  
20 supervisors for twenty years while our plaintiffs were under  
21 them. I think Sergeant Taylor was also just most recently  
22 promoted.

23 MR. BENSON: If I may be heard, Your Honor.

24 THE COURT: Yes.

25 MR. BENSON: Under that logic every single personnel

1 record of every single member of the department would be  
2 relevant and we would have an obligation to turn them over  
3 because that's how removed this is. It is a fishing expedition  
4 because they don't know, they don't have any idea of whether  
5 these people are similar or not. As you said they were many,  
6 many years removed with different people and different decision  
7 makers involved. Even if something existed there's no way that  
8 it could be relevant from -- or admissible from an evidentiary  
9 perspective. These -- every situation is different and some  
10 are closer than others but these are way out of bounds.

11 MS. WALDRON: The other -- Your Honor, I'll just go  
12 back to again what I was saying earlier is that we -- in a  
13 hostile work environment claim how you're treated if you're  
14 treated to intimidation by being written up for minor  
15 infractions while you know that other people in the department  
16 have not been written up for things that are more serious I  
17 believe that goes to a hostile work environment. If it's based  
18 on -- if we can then show that those things were done because  
19 of race.

20 THE COURT: Well, it would seem to me though that if  
21 there's a disproportionate penalty assessed for a minor  
22 infraction it has -- whatever relevance it may have to a  
23 hostile work environment is going to exist whether there's a  
24 comparator or not.

25 MS. WALDRON: But it would also -- Your Honor, it

1 would show that if you're the -- some of our plaintiffs know  
2 that if one of the sergeants or lieutenants or inspectors have  
3 been -- or lieutenants have had some more serious things happen  
4 and they're subject to -- that could show evidence of the MTA's  
5 intent and motive here that if white officers are white -- are  
6 not then how would that make that -- that would go to show the  
7 hostile work environment because they're like well, white  
8 officers can get away with a lot more than African-American and  
9 Hispanic officers. That would show a hostile work environment.

10 THE COURT: I'm not sure that is necessarily the case  
11 but that's not something I have to decide.

12 [Pause in proceedings.]

13 THE COURT: What about the fact that in all  
14 probability the decision makers for the supervisors are going  
15 to be different individuals than the decision makers who are --  
16 the decision makers with respect to the plaintiff's  
17 infractions?

18 MS. WALDRON: Your Honor, without seeing the records I  
19 can't tell you if that was true or not. If I don't know the  
20 decision makers I can't tell you that they definitely were not  
21 the same decision makers. The department does not have that  
22 high of a turnover. It's very likely that they could have  
23 possibly been. When I've been sitting in depositions I keep  
24 hearing some of the same names come up over and over again. So  
25 I'm not being speculating but I think that there is -- from

1 what we've seen there is a lot of the same decision makers in  
2 this case. I think that that's -- then rises to a level of  
3 like the Culhane and the McConville. I think that these --  
4 they were involved in some of this.

5 The only other thing that Your Honor -- that I can  
6 see is that if -- somehow for either Your Honor to do an in  
7 camera inspection review first and then for us to be able to  
8 tell -- without -- we only have the plaintiff's allegations.

9 THE COURT: An in camera review for what?

10 MS. WALDRON: To see if what these supervisor -- if  
11 you're concerned that they don't -- that there's nothing there  
12 or that there's no relevance then look at them. We believe  
13 that they are relevant. We believe that some of the decision  
14 makers are going to be the same decision makers that were  
15 involved in our plaintiff's case and that I believe if that was  
16 the case if a plaintiff sees a decision maker when -- make one  
17 sort of a decision for a white member of the unit or the  
18 department and makes a different decision based on -- for him  
19 who's -- he's African-American or Hispanic then how is that --  
20 I believe that goes directly to a hostile work environment. If  
21 you feel like you're being treated differently for minor  
22 infractions when -- and in addition to all the other comments  
23 that we say that have been made over the years.

24 THE COURT: Well, the difference in treatment is not  
25 enough unless the parties -- unless the comparator is similarly

1 situated the difference in treatment doesn't make a difference.  
2 Court of Appeals judges have more floor space than magistrate  
3 judges but that doesn't mean magistrate judges are the victims  
4 of discrimination.

5 MS. WALDRON: What happens if all happened -- what if  
6 they were promoted at the same time you were magistrate judge  
7 with them and that's where we're getting at, Your Honor,  
8 because some of these people were at the same level at the same  
9 time as some of our plaintiffs. Again, if a hostile work  
10 environment does not have a statute of limitations on it it can  
11 go past the three or four years that we're working with in this  
12 case and that's clear under National Railroad Morgan that that  
13 is the case. If it's not it can go to background evidence. It  
14 could go to motive. It could go to intent. Lots of different  
15 things. We're talking about discovery here.

16 THE COURT: As you're getting temporally remote and  
17 you have different decision makers involved the relevance  
18 diminishes.

19 Let me just ask this question of Mr. Benson.

20 MS. WALDRON: Right.

21 THE COURT: What I'm thinking as a starting point  
22 here -- let me just get your thoughts on it -- is limit -- with  
23 respect to supervisors and decision makers limit the production  
24 of the personnel file to those -- to any documents that reflect  
25 allegations of discrimination, allegations of excessive force,

1 the two things that you say Judge Lynch already covered and  
2 then have plaintiff prepare a list of the infractions for which  
3 they've been disciplined and that they believe they've been  
4 disciplined disproportionately and any similar charges of  
5 misconduct against the supervisors. What are your thoughts on  
6 that proposal?

7 MR. BENSON: Well, again, we've already produced the  
8 discrimination and excessive force documents. With respect to  
9 the other aspect of it, it would depend on the time period and  
10 whether or not the same decision maker was involved. To the  
11 extent that they can identify any alleged disparate discipline  
12 that took place between one of these individuals and one of the  
13 plaintiffs for the same --

14 THE COURT: They're not going to know what the  
15 supervisor/decision maker's disciplinary record is. So asking  
16 them to identify it creates an impossible task I think.

17 MR. BENSON: No. I mean they're going to identify the  
18 discipline that the plaintiffs allegedly -- that they claim was  
19 somehow untoward and then we're going to look at the files and  
20 then we're going to see whether there was something that was  
21 similar within a reasonable time period and involving a same  
22 decision maker. If somebody falls into that category which is  
23 a legitimate comparator then that documentation would be  
24 provided. If it falls outside of that then it should not  
25 rightfully be provided because for all the reasons that we've

1 indicated.

2 So our position from the beginning has always been we  
3 will produce reasonable comparative evidence and that falls  
4 into that.

5 MS. WALDRON: Your Honor, I think for the excessive  
6 force was not necessarily when Judge Lynch made his ruling was  
7 not limited to race, excessive force. If that's all that we  
8 have --

9 THE COURT: If I understood Mr. Benson correctly I  
10 don't think -- it's not my understanding that the defendant's  
11 production of excessive force is limited to racially --

12 MR. BENSON: It was not, Your Honor.

13 MS. WALDRON: I'm sorry. We only received the ones  
14 that had to do with race.

15 THE COURT: With respect to the disciplinary files of  
16 the supervisors and decision makers this is what I'm going to  
17 do is to direct the plaintiffs to provide a list of the  
18 infractions that plaintiffs believe they were  
19 disproportionately disciplined for and the date of the  
20 infraction.

21 With respect to the supervisors or decision makers,  
22 the defendants are either to produce documents reflecting  
23 charges of misconduct to the same infractions --

24 MS. WALDRON: Your Honor -- I'm sorry.

25 THE COURT: One second.

1 Or explain why the charge with respect to the  
2 supervisor decision maker is so remote either temporally or for  
3 other reasons that discovery should not be made. If you choose  
4 the latter course you can do it in a way that doesn't disclose  
5 to whom the infraction relates. You can use a pseudonym or  
6 just one of the -- you don't have to identify the supervisor or  
7 decision maker by name.

8 What did you want to say, Ms. Waldron?

9 MS. WALDRON: The --

10 THE COURT: This doesn't capture more serious  
11 infractions --

12 MS. WALDRON: That's what I was just -- more serious  
13 infractions.

14 THE COURT: -- for which they got a slap on the wrist  
15 but if the plaintiff doesn't know about the more serious -- if  
16 the plaintiffs don't know about the more serious infractions  
17 for which they got a slap on the wrist even under your theory  
18 it couldn't contribute to a hostile environment.

19 MS. WALDRON: But no. That's what I was going to say.  
20 Your Honor, we also would like to submit what the -- I will  
21 gather from my plaintiffs the allegations of the more serious  
22 infractions where they believe there was a slap on the wrist  
23 and we will include that in our submission then.

24 THE COURT: Well --

25 MS. WALDRON: Because then Your Honor could see what

1 we have.

2 THE COURT: If there's specifics --

3 MS. WALDRON: I will. I don't have them now.

4 THE COURT: Why don't you raise those with Mr. Benson  
5 in the first issue -- in the first instance but if there's  
6 specifics maybe yes, maybe no, but at this point I'm not --  
7 because we don't have specifics I'm not addressing that.

8 MS. WALDRON: If Your Honor -- after we raise it with  
9 Mr. Benson the first instance which I anticipate they'll say  
10 they know can I then submit it to Your Honor?

11 THE COURT: Yes, sure.

12 MS. WALDRON: Thank you.

13 THE COURT: I think that resolves the issues with  
14 respect to the personnel files but let me ask counsel. Have I  
15 overlooked anything with respect to the personnel files?

16 MS. WALDRON: Well, Your Honor, the only other thing  
17 is the -- for the two named plaintiffs we don't have -- we  
18 weren't even given anything at all. We believe that these were  
19 decision makers for --

20 THE COURT: I'm sorry. I think you misspoke. You  
21 said the two named plaintiffs?

22 MS. WALDRON: Defendants, defendants. I'm sorry if I  
23 misspoke, Your Honor. Named defendants, Culhane and McConville  
24 that we believe that we're entitled to some evidence about  
25 their -- they're defendants. We believe that they -- any

1 documents regarding what their career records are, their  
2 resumes, something of that sort just because we believe that  
3 they were decision makers through most of what's happened in  
4 this case and so that that kind of evidence -- that would be  
5 relevant for us.

6 THE COURT: How does that bear on whether or not there  
7 was discrimination? What if somebody went to college A or  
8 college B or --

9 MS. WALDRON: Not just college. It's what their  
10 career track is, what their -- basically their positions that  
11 they held, what their -- it's really more for background  
12 evidence. I can't believe that we don't have that. In every  
13 other case that I have a defendant I get this kind of evidence  
14 for defendants. That's why I'm a little surprised but they're  
15 objecting to every piece of it. So we have to --

16 THE COURT: You want what positions they've held  
17 within the MTA?

18 MS. WALDRON: Yes, career records, resumes. Then  
19 we'll get to -- we believe some of these, I think those two  
20 individuals also would fall into the other category of what  
21 this infractions but --

22 THE COURT: People often ask about this kind of  
23 information at depositions. I've never seen it used at a  
24 trial.

25 Let me see what Mr. Benson's thoughts are first.

1 MR. BENSON: Well, again, we're talking about the  
2 sanctity of the personnel files and presumably they're going to  
3 depose these individuals and to the extent that they want to  
4 find out the credentials of the individuals they can ask them  
5 and we don't have to impact their personnel files.

6 THE COURT: I'm not sure there's sanctity attached to  
7 personnel files.

8 MR. BENSON: No, there is sanctity attached to  
9 personnel files.

10 THE COURT: Even in today's world I wouldn't go quite  
11 that far.

12 MR. BENSON: Pursuant to Rule 50(a) of the New York  
13 Civil Service --

14 THE COURT: That's not what sanctity means. That's a  
15 statutory protection. That's not sanctity.

16 MR. BENSON: I misspoke, Your Honor. But my point is  
17 that again we're going through the same thing that we went  
18 through with Judge Lynch and he identified the portions of  
19 their files that he believed were relevant with respect to the  
20 claims at issue in this case and we have provided those to the  
21 plaintiffs. Anything outside of that is really not relevant to  
22 the allegations that are at issue here.

23 Again, to the extent that they will have the  
24 opportunity to depose these people and presumably find out  
25 certain information that will fill in the blank so to speak,

1 but it's really not a personnel file issue.

2 THE COURT: I'm not sure how someone's career track  
3 within the MTA makes it more likely or less likely that he or  
4 she will engage in discriminatory conduct. I'm not sure how  
5 one establishes -- how one is relevant to the issue in the  
6 case.

7 MS. WALDRON: Well, Your Honor, again we've made an  
8 allegation that despite people knowing about discrimination,  
9 despite people having been discriminators they're still seem to  
10 manage to become supervisors or higher levels within the MTA.  
11 So that would be -- this is really back --

12 THE COURT: Someone's career track, I don't see how --  
13 we're talking about the two named defendants here and I don't  
14 see how their career track makes it more likely or less likely  
15 that they discriminated against the plaintiffs.

16 MS. WALDRON: Well, Your Honor, it's really having to  
17 do with also -- it's starting to get into the next argument --  
18 the next segment of documents, the command rosters. It's  
19 really to state who was in what position -- what position were  
20 they in at the time when some of the discrimination was  
21 happening and if we can get it from the command rosters that  
22 may also be -- we're trying a lot of different avenues here,  
23 Your Honor, in that we're in the discovery phase and we're  
24 trying -- we're not doing fishing but we believe that these  
25 were things that will help the case, that there's evidence that

1 it's relevant to how the MTA is being run, where --

2 THE COURT: You're going to depose the individual  
3 defendants?

4 MS. WALDRON: I guess we're going to have to.

5 THE COURT: I presume you're going to want to do that  
6 in any event.

7 MS. WALDRON: Right. But without these records though  
8 we're going to have to.

9 THE COURT: If all you're looking for is track your  
10 career with the MTA --

11 THE COURT: In addition. In addition to the other  
12 things we've already discussed, Your Honor.

13 THE COURT: I understand that's on par of what you're  
14 looking for but isn't it -- is there any objection to that  
15 question being asked at the deposition?

16 MR. BENSON: None, Your Honor.

17 THE COURT: You just do it at a deposition.

18 MS. WALDRON: Again, Your Honor, your ruling is your  
19 ruling. I have received that in other cases but -- the command  
20 rosters are of the same --

21 THE COURT: Let's talk about the command rosters.  
22 Maybe the defendant can do this in the first instance. Can you  
23 tell me exactly what the command roster is?

24 MR. BENSON: The documents we're referring to for the  
25 time period we produced from 2003 to 2007 are a series of

1 charts which have boxes and lines and show the hierarchy in  
2 department by department within the MTA PD and we produced  
3 those four years back from the time of the complaint. And a  
4 little box with this deputy chief and who's underneath that  
5 person and so on.

6 THE COURT: It's only supervisors I take it.

7 MR. BENSON: Some of them are more complete year by  
8 year than others. So they might not necessarily be a  
9 supervisor but it doesn't go down to rank and file, uniform  
10 police officers. It can go down to the lowest person that has  
11 a certain function.

12 THE COURT: I see.

13 MR. BENSON: As I said, it's not consistent. What  
14 they've asked for now goes back to the inception of the MTA PD  
15 in 1998 to show the same kind of materials and the MTA's  
16 position is this is not going to be background information for  
17 a sexual harassment claim. It is reaching way back beyond the  
18 limitations period and --

19 THE COURT: And you produced it for what period of  
20 time?

21 MR. BENSON: We produced it for a four-year period  
22 going back from the date of the complaint which would be the  
23 limitations period under 42 U.S.C. 1981 which is the longest  
24 limitations period.

25 THE COURT: So what is that, '03 to '07?

1 MR. BENSON: Correct.

2 MS. WALDRON: Yes, Your Honor, but we -- as I've  
3 stated numerous times today, we have a hostile work environment  
4 claim which does not limit by that statute of limitations  
5 and --

6 THE COURT: Who was in what particular box? How did  
7 that bear on hostile work environment?

8 MS. WALDRON: Because, Your Honor, while we were going  
9 through -- we're asking for this evidence because we believe  
10 it's actually going to be help for time saving and efficiency  
11 purposes that when we're looking through who were the  
12 supervisors at the time. If a plaintiff can't remember or he  
13 does remember but where were they exactly at the time, these  
14 command rosters have actually been very helpful for showing us  
15 where everybody was at the time. We're talking about a one  
16 page document each. We're not trying to go back twenty years.  
17 We're only saying back to 1998 which was when the MTA and Long  
18 Island Railroad merged which appears to be a date that they  
19 can't seem to get documents before anyway. So it's not -- this  
20 is not a burdensome request. This would be very helpful --

21 THE COURT: I'm not sure what it's relevant to though.  
22 If the plaintiff can't remember who somebody was it's unlikely  
23 that that person was responsible for a hostile work  
24 environment.

25 MS. WALDRON: It's not just who they were but what

1 their position was. They know who it is but they may not know  
2 exactly where they were in the command at that time.

3 THE COURT: If they know who they were what does the  
4 position matter?

5 MS. WALDRON: Because that would show -- Your Honor,  
6 if it's someone -- what level they're at definitely shows it --  
7 it's evidence for us to show how the level is and how -- to  
8 infer how much of this can you infer to the MTA, how high level  
9 that person is at.

10 Your Honor, the other thing is we're going to be --  
11 if I look at the chart when I get it and I say oh, that person  
12 was a lieutenant at the time I may then say I want to take that  
13 person's deposition. If I find out he was just maybe a sergeant  
14 I may not need to. There's a lot of discovery in this case  
15 that we're having to choose -- pick and choose who are we  
16 deposing, who are we not and these command rosters that go back  
17 to '98 may help us to -- not even may. They will help us to  
18 narrow the case, narrow the issues or narrow depositions of  
19 that sort.

20 THE COURT: I'm not sure how it's going to narrow the  
21 depositions.

22 MS. WALDRON: We may not need to take a deposition of  
23 someone if they're not of a sufficiently high level when -- to  
24 make a claim.

25 THE COURT: Well, I would think that if you had

1 someone involved in egregiously hostile conduct you're going to  
2 want to take that person's deposition regardless of their rank.  
3 Even if you had a non supervisor making --

4 MS. WALDRON: But then, Your Honor, the next  
5 question --

6 THE COURT: -- hostile remarks, aren't you going to  
7 want to depose that person?

8 MS. WALDRON: We won't know -- we wouldn't necessarily  
9 know who that person's supervisor is and that person may then  
10 come back with I don't remember who my -- oh, 1998. A lot of  
11 these people don't remember the dates and we've seen that come  
12 up in our depositions so far. I don't remember exactly where I  
13 was in 2002 but I think this is where I was and this is who --  
14 where these command rosters place people exactly where they  
15 were at that time.

16 THE COURT: Let me ask defendant. What's the  
17 objection?

18 MR. BENSON: The objection, Your Honor, is we produced  
19 18,000 pages of documents in this case. They're continually  
20 asking for things outside of the statute of limitations period.  
21 We have -- we think there's no relevance to the request in  
22 general but we provided it for the relevant time period out  
23 of -- to avoid issues but there's a point when it's just not  
24 appropriate and our position here is that pursuant to the rules  
25 of evidence, pursuant to the rules of discovery there is

1 absolutely no relevance to this document whatsoever. If an  
2 individual is accused or supposedly engaged in in conduct that  
3 led to a racially hostile working environment it is  
4 unfathomable to me that the person who was making that  
5 accusation did not know who they were at the time, what rank  
6 they were at the time, who their supervisor was, and if they  
7 don't they can notice them for deposition and ask them. It's  
8 just putting a burden on us. These are not documents that are  
9 easily obtainable. They're not single page documents. They're  
10 a pain in the neck to recreate and go back and try to find and  
11 there's no relevance to them and we shouldn't have to produce  
12 them because again there's just nothing that's going to come  
13 from them that plaintiffs can't somehow get from some other  
14 source or to the extent that there was relevance which I don't  
15 see any.

16 MS. WALDRON: When we have to notice another ten  
17 depositions or twenty depositions to then find out who the  
18 supervisor was of this alleged harassment with the hostile work  
19 environment then we'll see why we need these. Not everyone --  
20 people remember who made the comment at the first level but  
21 there's issues in this case of how high then it went up above  
22 that, that supervisor. There's a chain of command, Your Honor,  
23 you know in police departments, and so then there's certain  
24 things that these supervisors -- should they have gone to their  
25 command officer -- the next command. Who was it at the time.

1 So that's really where we're going, but if Mr. Benson would  
2 rather have me take depositions of all the supervisors and  
3 their supervisors when we're ready -- we only have three more  
4 months to finish discovery in this case.

5 MR. BENSON: Your Honor, I have no problem if for  
6 plaintiff's counsel to pick up the phone and ask me who -- if  
7 there's somebody who falls into this category to call me up and  
8 ask me and I'll give you an answer.

9 MS. WALDRON: Then will I be able to submit that  
10 evidence in court some day?

11 THE COURT: This is --

12 [Pause in proceedings.]

13 THE COURT: With respect to the command rosters for  
14 the period prior to 2003, I'm going to sustain the objection  
15 but at the same time I'm going to grant plaintiff's leave to  
16 serve interrogatories seeking relevant information regarding  
17 the chain of command. If you have a situation where someone  
18 says I don't remember who my supervisor was, you can serve an  
19 interrogatory and they're going to have to answer it without  
20 regard to Local Rule 33.3 and for the --

21 MR. BENSON: We're okay with that, Your Honor.

22 THE COURT: I'm sorry.

23 MR. BENSON: I said that was what we were suggesting.

24 THE COURT: You'll get it in admissible form then.

25 MS. WALDRON: Yes. That's fine, Your Honor. We did

1 serve interrogatories of this nature and we got objections on  
2 it. We didn't pursue it because we thought we would get  
3 documents too but we will serve additional ones.

4 THE COURT: All right. Well, this is eliminating the  
5 Rule 33.3 objection. If the defendant wants to make a  
6 relevance objection, the relevance objection they can still  
7 make and if there's a problem we'll resolve it but presumably  
8 it won't be -- what I don't contemplate is identify the entire  
9 chain of command. What I contemplate are interrogatories  
10 asking about specific supervisors because there's been --  
11 they've been referenced in other discovery responses or they've  
12 been referenced by plaintiff. It's not an invitation to ask  
13 for the command roster through interrogatories.

14 MR. BENSON: Your Honor, I'm sorry. There's two  
15 issues with respect to the personnel files that were not  
16 previously covered.

17 THE COURT: Okay. Go ahead.

18 MR. BENSON: Two additional what they would phrase as  
19 disciplinary comparators are raised in a joint letter. One is  
20 a group of four or five individuals who were involved in an  
21 incident at Penn Station involving an assault of a civilian and  
22 none of the -- two uniformed police officers, a sergeant and a  
23 lieutenant. None of the plaintiffs were involved in this  
24 incident. None of the plaintiffs have alleged that they've  
25 been involved in a comparable incident and we objected to this

1 in that it has nothing to do with any discipline that the  
2 plaintiffs allege they've been disproportionately assessed  
3 with. Essentially, they're trying to show that -- as they  
4 said, this is a -- what they claim would be a particularly  
5 egregious incident that did -- they claim did not result in  
6 discipline. We don't think it has anything to do with anything  
7 the plaintiffs are claiming.

8           The second item would be there's an individual named  
9 Sergeant Quinn who is involved in a case with another  
10 individual who counsel represents in the Division of Human  
11 Rights where there was an altercation between the sergeant and  
12 the claimant -- complainant in that case. They have identified  
13 him as a comparator. None of the plaintiffs in this case had  
14 anything to do with that and this is simply seeking that  
15 individual's personnel file for purposes of that other case  
16 although they may claim that they want to show that he wasn't  
17 disciplined for that incident. None of the individuals here  
18 are alleging that they were in a physical altercation and were  
19 in a comparable incident where comparable discipline could be  
20 assessed.

21           THE COURT: Tell me about the assault on the  
22 individual in Penn Station first. What happened?

23           MR. BENSON: There was an incident where an individual  
24 at Penn Station was assaulted by a police officer. That police  
25 officer resigned rather than be terminated.

1 THE COURT: What happened to the individual?

2 MR. BENSON: The individual was a homeless individual  
3 at Penn Station who engaged in an altercation with a police  
4 officer and complained of physical injuries as a result, an  
5 African-American civilian homeless person in Penn Station.  
6 These individuals --

7 THE COURT: Did he or she wind up going to the  
8 hospital?

9 MR. BENSON: I believe -- that's likely the case, Your  
10 Honor.

11 THE COURT: Were any of the officers disciplined?

12 MR. BENSON: Yes.

13 MR. FUCHS: He resigned. He no longer has a job.

14 MR. BENSON: One officer resigns. Another -- a  
15 supervisor was terminated and two officers who came forward and  
16 cooperated were not. Again, this was a criminal proceeding.  
17 It was a separate proceeding. We don't think that has anything  
18 to do with the plaintiff's claims and we don't want to open up  
19 the door to extensive discovery about this other proceeding.  
20 We don't see how it compares to any discipline that the  
21 plaintiffs claim have been disproportionately assessed with.

22 THE COURT: The individuals involved in the assault on  
23 the homeless person, did they have the same supervisors as any  
24 of the plaintiffs --

25 MR. BENSON: Not that I'm aware of, Your Honor.

1 THE COURT: -- at the time?

2 MS. WALDRON: I think there was a possibility that  
3 there was, Your Honor. We can check. There's ones that we can  
4 easily find out. I didn't bring the [inaudible] because I  
5 thought it was covered by [inaudible] but we believe they're  
6 comparators, similarly situated people to some of our  
7 plaintiffs and this is exactly why we wanted the discipline  
8 files and the other misconduct issues. I thought that was  
9 covered by your ruling already.

10 THE COURT: Were any charges filed against the  
11 individual who was assaulted?

12 MR. BENSON: Against the civilian who was assaulted?

13 THE COURT: Yes.

14 MR. BENSON: I don't believe so, Your Honor.

15 MR. FUCHS: I don't know the answer to that. But  
16 disciplinary charges were filed in connection with both the  
17 individual accused of the assault and that person's supervisor,  
18 both of whom are no longer -- no longer work for us. One who  
19 resigned other than face discipline and the other who lost his  
20 job as a result of a discipline.

21 THE COURT: There were two other individuals involved  
22 who were not --

23 MR. FUCHS: Who are witnesses not involved in the  
24 assault who cooperated and provided testimony in the  
25 disciplinary proceedings and they were not.

1 MR. BENSON: The reason these are being sought is the  
2 two witnesses -- I guess the plaintiffs are under the  
3 impression that -- I'm sorry. They seek the files of all  
4 involved here. Again, none of the plaintiffs were involved in  
5 this incident.

6 MR. FUCHS: Or any similar incidents.

7 MS. WALDRON: Well, we do --

8 THE COURT: What are your thoughts, Ms. Waldron?

9 MS. WALDRON: Well, Your Honor, we have -- we chose  
10 these incidents because we felt that they were similarly  
11 situated in a sense that at least one of our plaintiffs was  
12 involved in an assault and received very different kinds of  
13 penalties. There was -- as far as we understood, there was  
14 issues about the penalties that were more lenient either it was  
15 because they were suspended but they were receiving payroll,  
16 they were suspended. There's issues in these cases that we  
17 believe do overlap and just because -- the Sergeant Quinn issue  
18 because we represent the --

19 THE COURT: Put Sergeant Quinn aside just for a  
20 moment.

21 MS. WALDRON: Just the Penn Station issue. We have a  
22 plaintiff in our case who was allegedly involved in an assault  
23 who was --

24 MR. BENSON: Who?

25 MS. WALDRON: Would you like me to release --

1 THE COURT: Just direct -- I want you directing your  
2 comments to me.

3 MR. BENSON: I'm sorry.

4 THE COURT: Go ahead.

5 MS. WALDRON: So, Your Honor, we believe that there  
6 was issues in how that was treated and the penalties that were  
7 given at the time and whether it was delayed in the penalties  
8 and whether they were suspended. This is a question about  
9 whether they were suspended with or without pay and how our  
10 plaintiff, one of our plaintiffs had been treated with regard  
11 to when he was involved with an assault issue. Then -- we --

12 THE COURT: It sounds as if it's ambiguous evidence.  
13 If you have two people who were -- who left the MTA and two  
14 people who were not disciplined I'm not sure that gives rise to  
15 any inference but --

16 MS. WALDRON: If we have -- if one of our plaintiffs  
17 was involved in an assault and was disciplined then that's --  
18 there would be issues here, Your Honor.

19 THE COURT: Well, was the plaintiff terminated?

20 MS. WALDRON: He was not terminated bu the was  
21 suspended without pay for a period of time.

22 THE COURT: So one of the individuals involved in the  
23 Penn Station assault was treated worse than your plaintiff. He  
24 was terminated.

25 MS. WALDRON: But some were treated better.

1 MR. BENSON: Your Honor --

2 THE COURT: So it's ambiguous.

3 MR. BENSON: If I may be heard. They're speaking  
4 about an MTA police officer named Mark Thomas who's not a  
5 plaintiff in this case. He was the one who was involved in the  
6 Sergeant Quinn case.

7 THE COURT: Who is the plaintiff who was involved in  
8 the assault?

9 MS. WALDRON: As far as we know we're not talking  
10 about Mark Thomas. We're under the belief based on allegations  
11 told to us by our plaintiffs about Mr. Blake Willett who's  
12 different.

13 Your Honor, again, we don't -- we have not ever seen  
14 these records. This is the first time we're hearing that  
15 people were terminated and not just suspended. But I do believe  
16 that some were treated better and some were treated worse.  
17 There is evidence there and it also --

18 THE COURT: There's evidence there that points in  
19 those directions.

20 MS. WALDRON: But let me just -- if I could address  
21 that. If you're terminated because you put -- you assault  
22 somebody and put them in the hospital then that maybe is  
23 appropriate discipline for one time but if our plaintiff only  
24 assaulted someone or didn't assault someone who was not found  
25 to be assaulted and then was suspended then there is an issue

1 of -- here if it's not --

2 THE COURT: With respect to the assault in Penn  
3 Station I'm going to direct that the files be produced but  
4 there's an argument for relevance that the plaintiff is making  
5 here which -- this is subject to my earlier proviso that the  
6 defendants have the option of making the submission to --  
7 making a factual submission to show that the punitive  
8 comparators are so differently situated that they were not  
9 comparators as a matter of law. But unless you elect to go  
10 down that route I'm not going to accept the files with respect  
11 to the Penn Station assault.

12 Tell me a little bit more about Sergeant Quinn.  
13 Sergeant Quinn is one of the comparators, one of the  
14 individuals they designate as a comparator?

15 MS. WALDRON: We believe that we did because he was  
16 engaged at the time --

17 THE COURT: I'm sorry. Sergeant Quinn is designated  
18 as a comparator?

19 MS. WALDRON: We have him under the comparator file.  
20 He was involved in an altercation with an African-American  
21 officer and made a derogatory comment to that officer. That  
22 African-American officer is not a plaintiff in this case but we  
23 do believe that this is again evidence that would bear on  
24 how -- that the African-American officer is similarly situated  
25 to our -- this is evidence of --

1 THE COURT: Wow, wow. Let me make sure I understand  
2 the situation correctly. Sergeant Quinn was engaged in an  
3 altercation with an African-American officer and made a  
4 derogatory comment to that African-American officer?

5 MS. WALDRON: Yes.

6 THE COURT: And he was not disciplined for it?

7 MS. WALDRON: I'm sorry, Your Honor. What was your  
8 question? Was he disciplined for that?

9 THE COURT: Was he disciplined for it?

10 MS. WALDRON: No, that's what we believe. He was not  
11 disciplined for it.

12 THE COURT: Did the plaintiffs make racially  
13 derogatory remarks about anybody?

14 MS. WALDRON: Did plaintiffs?

15 THE COURT: Yes. The infraction you're saying that  
16 Quinn committed was the racially derogatory remark.

17 MS. WALDRON: In addition to there was some sort of a  
18 physical altercation and then he was not disciplined for that,  
19 Your Honor.

20 THE COURT: Have the plaintiffs engaged in similar  
21 conduct?

22 MS. WALDRON: That plaintiff -- that African-American  
23 officer --

24 THE COURT: No. The plaintiffs that you're  
25 representing in this case, were they involved in similar

1 conduct, altercations with other members of the police force or  
2 making racially derogatory remarks?

3 MS. WALDRON: Yes, Your Honor.

4 THE COURT: The first or second or both?

5 MS. WALDRON: The second where -- one of our  
6 plaintiffs was involved in an altercation with a supervisor  
7 where a racially derogatory comment was made by that supervisor  
8 to the officer.

9 THE COURT: No. Did the plaintiffs make racially  
10 derogatory remarks?

11 MS. WALDRON: Well, they --

12 THE COURT: The question here is --

13 MS. WALDRON: Yes.

14 THE COURT: On the comparator theory it was -- was  
15 Quinn -- did Quinn receive -- did Quinn receive more favorable  
16 treatment for similar misconduct?

17 MS. WALDRON: Uh-hum.

18 THE COURT: So I'm trying to determine whether or not  
19 any of the plaintiffs engaged in misconduct similar to the  
20 misconduct Quinn made -- Quinn is attributed to.

21 MS. WALDRON: I don't know of any plaintiffs who made  
22 racially derogatory comments because we're all of minority  
23 race. So I don't know of --

24 THE COURT: Anyone can do anything in today's world.

25 MS. WALDRON: I understand. Actually, no. You know

1 what, we do have one. Yes, we do. One of our plaintiffs  
2 was -- there is an allegation that he made some remarks to  
3 another member or minority which we believe were unfounded and  
4 part of this --

5 THE COURT: He was disciplined for those --

6 MS. WALDRON: He wasn't disciplined though, Your  
7 Honor. He wasn't disciplined.

8 THE COURT: He was treated the same as Quinn?

9 MS. WALDRON: I guess he was treated the same. They  
10 don't discipline for making racially derogatory comments.

11 THE COURT: So what does Quinn get you?

12 MS. WALDRON: The file is having to do with how  
13 under -- there's a recent Supreme Court decision that came out,  
14 Sprint, where it was talking about similarly situated -- other  
15 employees not necessarily just similarly situated -- the  
16 supervisors don't have to be similarly situated but if there's  
17 evidence of an employee who's similarly situated, if he was  
18 treated and I think that falls -- this falls under that  
19 category about how this other African-American officer was  
20 treated. Maybe the way we worded our requests --

21 THE COURT: No, it's not how the other African-  
22 American officer was treated. It's how Quinn was treated is  
23 the inquiry.

24 MS. WALDRON: But within that altercation, Your Honor.  
25 So both Thomas and how Quinn was treated within that

1 altercation. Both sides of that altercation is what I'm  
2 talking about.

3 THE COURT: I don't understand your point.

4 MS. WALDRON: That --

5 THE COURT: I thought you wanted Quinn's disciplinary  
6 file.

7 MS. WALDRON: We do because we don't --

8 THE COURT: But it sounds like Quinn -- it sounds like  
9 Quinn's treatment and the treatment of the plaintiff for making  
10 a racially derogatory remark was the same.

11 MS. WALDRON: No, Your Honor. It was a different  
12 point that I was trying to make was that how he was treated  
13 with an altercation with an African-American officer. That's  
14 what we were focusing in on.

15 THE COURT: Were any of the plaintiffs disciplined for  
16 engaging in an altercation?

17 MS. WALDRON: With other members of the -- yes.

18 MR. BENSON: May I be heard, Your Honor?

19 THE COURT: Yes. Go ahead.

20 MR. BENSON: Quinn is a sergeant. Officer Mark Thomas  
21 who is the subject of another proceeding and not a plaintiff  
22 was his subordinate and his direct report. Officer Thomas  
23 physically assaulted Sergeant Quinn and was brought up on  
24 disciplinary charges for that. Officer Thomas accepted  
25 discipline, signed a waiver accepting discipline in connection

1 with the entire incident where he acknowledged wrongdoing, he  
2 admitted guilt to the conduct that was charged and he waived  
3 his right to challenge it or go to any disciplinary proceeding.  
4 There was never any finding of anything other than Officer  
5 Thomas' admission that he engaged in the wrongdoing at issue  
6 and his signing a waiver.

7 So Quinn, who has never been the subject of -- he  
8 didn't do anything wrong. Thomas admitted he was wrong in  
9 connection with the incident and --

10 THE COURT: So no charges were ever brought against  
11 Quinn?

12 MR. BENSON: No. He didn't do anything wrong.  
13 Charges brought against Thomas --

14 THE COURT: So then there are no documents to produce.  
15 What documents are there to produce then?

16 MR. BENSON: They're asking for the entire personnel  
17 file including any discipline --

18 THE COURT: I never ordered the production of  
19 anybody's entire personnel file.

20 MS. WALDRON: Your Honor, it seems that we're talking  
21 about the discipline files.

22 THE COURT: There are no documents I've just been  
23 told.

24 MR. BENSON: In connection with that absolutely not.  
25 He was not brought up on charges.

1 THE COURT: So there's nothing to produce then. Am I  
2 misunderstanding something?

3 MR. BENSON: There's nothing to produce.

4 MR. FUCHS: There would be no documents relating to  
5 that incident, discipline against Sergeant Quinn for that  
6 incident.

7 THE COURT: Then there's nothing to produce.

8 Is there anything else that plaintiffs want to raise?

9 MS. WALDRON: I thought it was all covered.

10 THE COURT: I'm sorry.

11 MS. WALDRON: No, Your Honor.

12 THE COURT: Is there anything else defendants want to  
13 raise?

14 MR. BENSON: Nothing, Your Honor.

15 THE COURT: Thank you all.

16 Just one general request as the case goes on. If  
17 there's a request for documents for which the defendants  
18 object, first make sure there are responsive documents. What  
19 oftentimes happens in a lot of cases is there's a fight over --  
20 on the basis of the request itself and you never go to your  
21 client and find out there's really nothing there anyway. It  
22 will save everybody time and trouble I think.

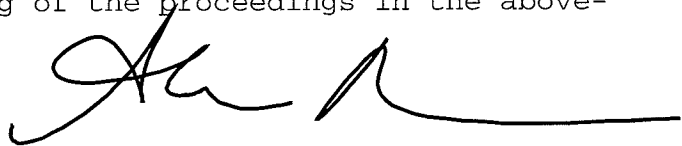
23 Thank you all.

24

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\* \* \* \* \*

I certify that the foregoing is a court transcript from an electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in black ink, appearing to read 'Shari Riemer', written over a horizontal line.

Shari Riemer

Dated: August 8, 2008